Supreme Court, U.S.
FILED

941872 MAY 11 1995

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CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

DAVID H. DEIBLER and CARRIE J. DEIBLER,

PETITIONERS

vs.

ATLANTIC PROPERTIES GROUP, INC., and THE DINNER BELL INN, INC.,

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the petitioners were deprived of due process of law when their stock in certain corporations was exposed for sale by a Sheriff at public sale without first notifying potential buyers regarding the particulars of the corporations in sufficient detail so as to apprise a potential buyer of the worth of the stock.

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REPORTED OPINIONS DELIVERED IN THIS CASE BY OTHER COURTS

None.

A CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED

A. Date of the entry of the judgment sought to be reviewed:

January 11, 1995.

B. Date of the order refusing a rehearing:

February 10, 1995.

C. Statutory provision conferring jurisdiction on the Supreme Court of the United States:

Title 28 United States Code,

Section 1257(a)

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Constitution of the United States, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war, or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private

property be taken for public use, without just compensation.

Constitution of the United States, Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers,

counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts

incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CONCISE STATEMENT OF THE CASE

PROCEDURAL HISTORY

On July 30, 1993, a Sheriff's Sale took place in Georgetown, Delaware, of the stock of three corporations owned by David H. Deibler and Carrie J. Deibler ("Deibler"). The three corporations whose stock was sold were: (1) The Olde Dinner Bell Inn, Inc., ("DBI"), (b) Coastal Resort Properties, Inc. ("CRP"), (c) Distance Horizon Dream, Inc. ("DHD"). On August 12, 1993, Deibler filed in the Court of Chancery in New Castle County, an action against the successful bidder, Atlantic Properties Group, Inc. ("Atlantic") seeking a temporary restraining order and a declaration that the sale of July 30, 1993 was null, void, and of no effect. *David H. Deibler and*

Carrie J. Deibler v. Atlantic Properties Group, Inc., C.A. No. 13074. An answer was timely filed. As the result of a teleconference with the Honorable Carolyn Berger and agreement among the parties, the request for a temporary restraining order was withdrawn.

As the result of hearings in a parallel case, *Prickett, Jones, Elliott, Kristol & Schnee, P.C. v. David H. Deibler, et ux.*, C.A. Nos. 92J-11-054, 92J-11-055, 92J-11-056, the Honorable T. Henley Graves decided, without opinion, that he retained jurisdiction through the inherent powers of the Superior Court to monitor and ultimately decide on the propriety of sales of personalty which were conducted under the aegis of a Superior Court order.

On November 1, 1993, an action was commenced by Atlantic and DBI against Deibler entitled, *Complaint and Petition for Rule to Show Cause in the application for Writ of Possession,* in order to bring the issue of the validity of the July 30, 1993 sale to the Court for resolution. Hearing was held before the Honorable T. Henley Graves on December 30, 1993 and January 4, 1994. After close of testimony, but before rendering his oral decision, the Honorable T. Henley Graves initiated a teleconference between himself and counsel for the parties and requested that counsel for Atlantic in his capacity as counsel for Guardian Capital Corp.[1] to agree not to pursue

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[1] A corporation with the same ownership as Atlantic, but not a party to the

Deibler with regard to a deficiency judgment. Later that day and prior to decision, counsel for Atlantic faxed to the Court a letter agreeing not to pursue the deficiency judgment. The teleconference was initiated *sua sponte* by the Court without request or motion of either party. Thereafter, in the afternoon of January 5, 1994, because of the pendency of other foreclosure actions involving related parties, the Court orally advised the parties through their counsel of his decision sustaining the sales and granting a Writ of Possession. On January 6, 1994, the written decision and order of the Court was entered, and on January 7, 1994, the Writ of Possession was entered. On February 3,

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litigation.

1994, a timely appeal was taken from the oral decision and order of January 5, 1994, the written decision and order of January 6, 1994, and the order granting Writ of Possession dated January 7, 1994.

FACTUAL HISTORY

The events and circumstances which culminated in the sale of the stock of three Deibler-owned corporations, DBI, CRP and DHD is tortuous and convoluted, both factually and legally. For present purposes, it is sufficient to say that by the spring of 993, Prickett, Jones, Elliott, Kristol and Schnee ("PJEKS"), Deibler's former attorneys in several bankruptcies, had withdrawn as counsel and had transferred to Sussex County as a

judgment, their fee award from the Bankruptcy Court. Having gained intimate knowledge of the Deibler's financial affairs through their former representation, PJEKS was able to formulate a plan of execution against the Deibler assets to obtain payment of their fees. With knowledge of the corporate structure as well as the assets of each of the Deibler corporations, PJEKS directed the Sheriff to levy on the stock of DBI, CRP, and DHD corporations owned by the Deiblers. PJEKS was aware that it had to move quickly in order to execute and sell prior to the Deiblers' filing for bankruptcy to protect the assets. PJEKS was aware that Deibler was prohibited from filing for bankruptcy prior to August 5, 1993, since they had been instrumental in obtaining a

dismissal of their former client's bankruptcy earlier that year.

As the result of their representation of Deibler in his bankruptcy, PJEKS was also aware that the major creditor with whom Deibler was dealing was Guardian Capital Corp., to whom the Deiblers owned in excess of $700,000.00 resulting from a deficiency judgment obtained from the sale of other Deibler assets.[2] Realizing that its interest could best be served by cooperation with Guardian Capital Corp., PJEKS began a series of negotiations with Ronald B. Hirsch ("Hirsch"), a principal

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[2] Deibler has questioned the propriety and amount of the deficiency judgment, which is part of the earlier history of these parties, but is not relevant for the issues presently before the Court.

of Guardian and, in effect, the Chief Operating Officer (A-5,6).

To facilitate bidding and ownership of assets Hirsch, on behalf of the owners of Guardian, created Atlantic (A-). On July 2, 1993, the Court entered an order scheduling the sale of stock for July 30, 1993 (A-5,6). The Court rejected the Deibler's request for a) additional time for advertising, b) a staged sale of the stock and c) that, since the assets of the corporation were essentially real estate, the same rules and parameters for advertising and notice be used for the sale of the stock as would be for the sale of real property.

The sale bills were prepared and the minimum posting required pursuant to 10 Del.C. §4972 was accomplished. The sale bills provided no information other than

that the following goods and chattels would be subject to sale:

100 Shares of Stock - Distant Horizon Dream, Inc.

100 Shares of Stock - The Olde Dinner Bell Inn, Inc.

10 Shares of Stock - Coastal Resort Properties, Inc.

(A-66)

Conspicuously absent was any reference to the underlying assets of any of the corporations, including the significant real estate owned by each. Additionally, there is no reference to the percentage ownership represented by the said stock being sold, or of any individuals to contact in the event of any questions. In short, there is little to pique the curiosity of even the most ardent investor.

On the day before and morning of the sale, it had become obvious to all involved that Deibler, in an attempt to salvage something from a lifetime of hard work, had attempted to thwart what he perceived to be an unfair and unforgiving system. Based upon what he perceived to be good legal advice, but which if given was certainly wrong, and potentially criminal, Deibler attempted to strip the corporations of their assets, and in fact, dissolved DBI and DHD (A-55). The Court, expressing a continuation of the anger that he had towards Mr. Deibler, directed him to undo that which he had done, in terms of dissolution and liquidation of assets. Under a threat of at a minimum of finding Mr. Deibler guilty of limit contempt with incarceration until the contempt was

purged, and at worst, a referral to the Attorney General's office for criminal prosecution under 11 Del.C. §863, Interference with Levied-on Goods, the Court left no doubt that it considered the liquidations and dissolutions of no force and effect. (A-) Although the actual documents were not executed until later, the final document being the certificate of correction, the certificate of dissolution of Coastal Resort Properties, Inc. was not filed until January 27, 1994. (A-95) Deibler, as well as all parties involved, were aware that the sale of the stock to be held on July 30, 1993 was of the actual corporation, and of their assets. If that were not so, then the sale could be of no force and effect since as of the moment of the sale, the corporations in which

the stock was being sold were in fact dissolved.

The hearings on December 30, 1993 and January 4, 1994 were to a large extent for the presentation of appraisal testimony. John J. Mattey ("Mattey") testified on behalf of Deibler as to the fair market value of the 1.51+ total acres of land and improvements, personalty and good will, if any, in the "business enterprise" known as The Dinner Bell Inn. Mattey concluded that the fair market value in total was $2,970,000.00. (A-109) Mattey personally inspected the subject property and based upon the actual physical inspection, which included use of the tape measure to determine square footage of the various parts of The Dinner Bell and concluded that the useable restaurant square

footage was 10,090 square feet. (A-) There was no dispute between Mattey and Philip J. McGinnis ("McGinnis") that the highest and best use of the land and improvements of The Dinner Bell Inn were for its present use. (A-28A, 38) Mattey gave greatest emphasis to the sales comparison approach, and confirmed that with its replacement cost approved. (A-109, 110) Mattey chose not to use the income approach since he believed that the numbers which were generated by the use of the financial statements of the DBI resulted in conclusions inconsistent with reality. (A-288)

Because of the dearth of the sales in the Rehobeth Beach area, as well as the great sensitivity to land values that results from the location of property in resort areas, it was difficult to

conclude land values. While in one sense all land sales and all land are comparable to others, the determination for the appraiser is to find highly comparable properties upon which to base his conclusions. (A-28C, 29) The choice of comparable sales by Mattey reflects the unique nature of resort property. The conclusion of value arrived at by the comparable sale method was corroborated by the cost estimate. An integral part of the cost method, however, does include a calculation of land value.

Mattey thereafter analyzed an array of restaurants and motels to determine value for these entities. A-29) Again, because of the dearth of sales, it was difficult to obtain highly comparable comparisons. Nonetheless, as the result of analysis, Mattey concluded that the

value of The Olde Dinner Bell Inn, Inc. as a going business was $2,970,000.00 (A-31) Mattey thereafter opined on the value of the stock of DBI and concluded that, taking into account all the known existing obligations and adding in an additional amount for contingency, the net value of stock was $1,896,003.53, or $3,792.007 per issued share. (A-33)

By contrast, Philip J. McGinnis ("McGinnis") testified on behalf of Atlantic. McGinnis acknowledged that it was not he, but rather a "staff appraiser", Charles H. Darrell, who "did the inspection and did most of the research finding the comparables, verifying sales and leases, and so forth drafted the reports." (A-37) In fact, the cover page of the appraisal indicates that it was prepared by Charles H.

Darrell ("Darrell") and the certificate of value was signed by Darrell. (A-67-69) Interestingly, there is nothing in the appraisal as filed nor in the testimony of McGinnis that speaks of the qualifications of Darrell. Neither Darrell nor McGinnis did a physical inspection of the interior of the property, nor did they consult building plans or talk with Mr. Deibler in coming to their conclusions as to the subject property. This is most important because McGinnis concluded that the most accurate method of determining value was using an incoming approach based upon other properties experiences based on a square foot basis (A-41A, B)

McGinnis initially concluded, based upon the income approach as confirmed by his comparable sales and cost

calculations, that the market fair value of DBI was $1,450,000.00. (A-42) After direct examination, during a luncheon break but before cross-examination began, McGinnis realized that the appraisal contained significant mathematical errors resulting in an increased value for DBI to $1,686,000.00. (A-31) McGinnis' entire income approach to the restaurant is based upon square footage which he concluded was 6,435 square feet. (A-45) From his testimony, it is clear that McGinnis had no idea of the physical layout of the Dinner Bell, the number of dining rooms, or even whether there was a cocktail lounge. (A-46) By his own admission, he excluded the "Crab Deck" as well as the interior patio / courtyard. (A-47) McGinnis acknowledged that his sole information as to the square footage

of the restaurant came from the property card at the land records of the county, (A-33A) but agreed that if there was a discrepancy of the overall size of the Dinner Bell Restaurant his income number would be incorrect. (A-34) Both Mattey and Deibler testified that the square footage of the Dinner Bell Restaurant was significantly greater than the number used by McGinnis. (A-30, 60, 54) Mattey thereafter went through the mathematical calculation of the value of DBI. Although not agreeing with McGinnis' numbers of premises, (a-61, 63) Mattey concluded that using McGinnis' analysis, the value of DBI would be $2,048,612.00. (A-63)

The $10.00 per square foot used by McGinnis was obtained by the use of four comparable sales. (A-39) Analysis of those sales showed that none of them are

highly comparable to the Dinner Bell. Three of the comparables are grouped on Rehobeth Avenue, a minimum of five to six blocks from the beach. (A-49) The first was a Sheriff's sale, the third and fourth comparables were effectively bars, with limited restaurant facilities. (A-49) The fourth comparable was on Route 1, approximately two miles from the beach. (A-71)

The assets of Coastal Resort Properties Inc. were a single family older two-story home at 5 Maryland Avenue, which was in need of renovation or remodeling, and 7 Maryland Avenue, composed of four condominium units with a fifth potential unit in the rear. Robert Kaufman ("Kaufman") appraised the properties for Deibler, using the comparable sales approach. Kaufman

compared 5 Maryland Avenue to three properties that were highly comparable to the subject property. (A-35) Kaufman estimated that the fair market value of the subject property was $250,000.00. (A-36) Mr. Kaufman similarly analyzed the condominia located at 7 Maryland Avenue and compared the subject property to three highly comparable condominia. Kaufman adjusted for the most important single consideration for resort property, which is locating, as well as for size and condition. Kaufman estimated the fair market value of each of the four main condominia at 7 Maryland Avenue to be $165,000.00. After considerable testimony as to the fifth unit, which Kaufman originally valued at $125,000.00, he concluded during his testimony that the value was excessive based upon a

potential problem as to its use, and the potential cost of building the property to city specifications. (A-36A)

These properties were also appraised by McGinnis on behalf of Atlantic. Kaufman also compared the subject property to three comparables. As can be seen from the map showing the location of the comparables, none of them were near the beach. (A-36B & C) Notwithstanding, McGinnis made no adjustment for location and concluded that the fair market value for 5 Maryland Avenue was $203,500.00. Similarly, for 7 Maryland Avenue, McGinnis compared the subject property with three comparables. Again, McGinnis made no adjustment for location, and no adjustment for the fact that the subject property had been remodeled within the last two to three years. McGinnis did

make adjustments, however, varying between $4,000.00 and $7,500.00 per unit for inferior construction, and in two instances for either ocean front or ocean view. (A-44) Upon examination, however, McGinnis acknowledged in his analysis of 5 Maryland Avenue, that in a resort property location is the primary and most important aspect of price. (A-50) McGinnis acknowledged that in each instance where he had failed to make a location adjustment, in fact location adjustment should have been made. (A-51) In his analysis, McGinnis had concluded that his second comparable was the comparable he used to base his conclusion of fair market value. (A-43) He then agreed that his conclusion of value was incorrect, because he should have taken a location adjustment to reflect a

difference in the value of the property for the subject. (A-52) The two comparable sales that were in the beach block were in each instance located on the fifth floor of high-rise condominia. Although McGinnis took significant adjustments with regard to view, in his testimony he indicated that the sole basis for the determination was that the multilist indicated that there was ocean view, but that he himself could not testify as to where in the building the condominiums were located. (A-58)

RAISING OF FEDERAL QUESTIONS

IN THE STATE COURTS

The Federal Constitutional issues were briefed and argued before the Supreme Court of Delaware.

REASONS RELIED ON FOR THE ISSUANCE OF THE WRIT

The petitioners were deprived of due process of law when their stock in certain corporations was exposed by a Sheriff at public sale without first notifying potential buyers regarding the particulars of the corporations in sufficient detail so as to apprise a potential buyer of the worth of the stock.

Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of

the Due Process Clause of the Fifth and Fourteenth Amendments. *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974). "Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act." *Lambert v. California*, 355 U.S. 225, 228. The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked.

Anderson National Bank v. Luckett, 321 U.S. 233, 246 (1944). *Grannis v. Ordean*, 234 U.S. 385, 394. It is an opportunity which must be granted at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); see *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Griffin v. Griffin*, 327 U.S. 22; *Covey v. Town of Somers*, 351 U.S. 141; *Walker v. Hutchinson City*, 352 U.S. 112; *Schroeder v. City of New York*, 371 U.S. 208. "The means employed must be such as one desirous of actually informing the [opposing party] might reasonably adopt to accomplish it."

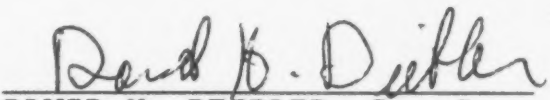
Mullane v. Central Hanover Tr. Co., 339 U.S., at 315.

We respectfully submit that the egregious injustice done to Mr. and Mrs. Deibert shocks the conscience and has offended the minimal standards of due process which the Fifth and Fourteenth Amendments guarantee. For this reason, we urge that your Honorable Court grant a Writ of Certiorari.

CONCLUSION

For the reasons set forth above, it is prayed that your Honorable Court grant a Writ of Certiorari.

RESPECTFULLY SUBMITTED,



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